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BUREAU OF INTELLIGENCE AND RESEARCH: ISSUES PAPER

U.S. Interests in the Law of the Sea

The Third UN Conference on the Law of the Sea has been meeting in semi-annual sessions since December 1973 to negotiate a new oceans convention. The tenth, and hopefully the last, session of the Conference will convene next March, probably in New York, for six-weeks to complete the final text of the Draft Convention. Assuming the US signs the Convention, there is then the issue of US ratification of the Convention, and its eventual entry into force. Three current questions are of concern with respect to US foreign policy: (1) will the Convention negotiations be completed soon; (2) do the provisions of the Convention generally conform to US interests; and (3) how might the US fare in a no-treaty situation?

Provisions of the Draft Convention

During the course of the conference a series of informal texts, containing suggested articles of the new Convention, have been issued to serve as bases for negotiations. The latest revision, the Draft Convention on the Law of the Sea (Informal Text), was issued in September 1980, it contains 320 articles and eight annexes. Although a few revisions are likely to be made in the draft at the tenth session, the document substantially represents the text of the final Convention which will ultimately be submitted for signature.

Among the major unresolved questions at the close of the ninth session were those involving the Preparatory Commission, Preparatory Investment Protection, and the entities entitled to become parties to the Convention. In addition, the wording of the articles regarding delimitation of economic zones and continental shelves between neighboring states had yet to be settled. Some modifications might also be made with respect to stocks of fish occurring both within and beyond a coastal state's exclusive economic zone.

So far as the Preparatory Commission is concerned, the conference needs to complete the resolution setting up the Commission for the Establishment of the International Seabed Authority and the drafting of rules, regulations, and procedures concerning it. With respect to Preparatory

Investment Protection, it is felt by the US and other industrial powers that prospects for support of the Convention would be significantly improved if means were found to ensure that those who make investments in seabed mining prior to the entry into force of the Convention would, if qualified, be accorded priority in seeking a contract from the seabed authority.

Participation in the Convention by entities other than states is an explosive political issue. On the one hand, there are legitimate interests, such as the European Community, and certain associated states, including those emerging from the Trust Territory of the Pacific Islands. On the other hand, there are liberation organizations, such as the PLO, which seek to become parties to the Convention and eventually to share in the allocations of revenue from mineral exploitation on the deep seabed or on continental margins beyond 200 nautical miles from the coast.

US Interests and the Draft Convention

There are several categories of provisions in the Draft Convention in which U.S. interests are closely involved. Priority items include (1) Offshore Jurisdictional Zones; (2) the High Seas; (3) Straits Used for International Navigation; and (4) the Seabed Regime.

Offshore Jurisdictional Zones. The Draft Convention calls for a territorial sea with a maximum breadth of 12 nautical miles, and an exclusive economic zone (eez) extending to a maximum of 200 nautical miles. The Convention also provides for a continental shelf which extends seaward to the "outer edge" of the continental margin, thereby assuring the US jurisdiction over the hydrocarbon and other natural resources of all but the outermost part of the continental shelf, slope and rise. Within its eez, the coastal state has sovereign rights over living and non-living resources; it also has jurisdiction with regard to the establishment and use of artificial islands, installations and structures, the protection and preservation of the marine environment, and marine scientific research.

The High Seas. The traditional freedoms of the high seas are preserved in the Draft Convention; these are freedom of navigation, overflight, the laying of submarine cables and pipelines, fishing, and scientific research. Although the first three freedoms pertain within as well as beyond, the limits of the eez, freedom of fishing and of scientific research exist within the eez only as residual rights to be granted with the consent of the coastal state.

The US has never supported the principle of the consent regime for marine scientific research in the eez. The US is concerned that coastal states will seek, in their eez, to control highly migratory species as they do coastal stocks, rather than working through the appropriate subregional or regional organizations as called for in the Draft Convention.

Straits Used for International Navigation. Early in the Conference, the US and other like-minded states, won recognition of the principle of unimpeded transit passage, including the rights of overflight and of passage of submerged submarines, through straits used for international navigation between one area of the high seas or an eez, and another area of the high seas or an eez. US navigational interests, including those of the military, appear to be fully protected, so far as these straits are concerned. In addition, archipelagic states, such as Indonesia, must designate "sea lanes" through their inter-island waters, must guarantee transit passage for foreign vessels and aircraft, through these lanes.

The Seabed Regime. This is the most contentious of the issues in the Draft Convention. The U.S. delegation, through long negotiations, secured provisions which appear to conform with minimal US requirements, particularly through the medium of the "parallel system" of ocean mining. There are groups in the US, however, which feel that the text is inadequate from the standpoint of such issues as production controls, financing the enterprise, mandatory transfers of technology, financial terms of contracts, and decision-making in the Council of the Seabed Authority.

Other Issues. Provisions in the Draft Convention on the protection and preservation of the marine environment have conformed fairly closely with US policy positions. The articles dealing with the settlement of disputes are acceptable, and the wording of the articles on the development and transfer of marine technology do not impose severe costs or restrictions on the US. American suggestions for geographical restrictions on the definition of archipelagic states are embodied in the Draft Convention.

Potential Impacts of a No-Treaty Situation

Despite the achievements of the US Delegation during seven years of negotiations, it is possible that no Convention will come into force, at least so far as the US is concerned.

-- There may be no resolution of outstanding issues, and no Convention signing.

-- There may be a signed Convention, but one which does not come into force because the number of ratifications or accessions is less than the required 60.

-- There may be a Convention in force to which the US is not a party.

What might be the impact on US interests of these scenarios.

The Department of Defense is adamant that the provisions for transit passage through straits used for international navigation be protected. Defense and commercial interests are concerned that the dispute settlement procedures, as outlined in the Draft Convention, be applied where navigation and other high seas freedoms are jeopardized by a coastal state in its eez.

The obligation of states to grant other states access to the surplus of the allowable catch within their eez is a matter of importance to US fishing interests.

There are those who argue that the non-seabed provisions of the Draft Convention would in time become tenets of customary international law, even if the Convention did not come into force. Given this situation, US mining interests unilaterally would carry out exploration and exploitation of deep seabed resources, while the US could look forward to general acquiescence in the non-seabed provisions of the Convention.

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